

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GAETANO D'ATTORE,

Plaintiff,

-v-

NEW YORK CITY, (CORPORATION COUNSEL),
NEW YORK CITY DEPARTMENT OF
CORRECTION'S COMMISSIONER Dr. DORA B.
SCHIRRO, (WARDEN) EVELYN MIRABEL,
(WARDEN) JUAN QUINONES, (CORRECTIONAL
OFFICER) MITCHELL, SHIELD #9627 -
TOUR 7:00am - 3:00pm, (CORRECTIONAL
OFFICER) - LEON, SHIELD # 18527 -
TOUR 7:00am - 3:00PM,

Defendants.
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USDC SDNY
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DATE FILED: 8-17-11

10 Civ. 3102 (JSR) (MHD)

ORDER

JED S. RAKOFF, U.S.D.J.

On June 2, 2011, the Honorable Michael H. Dolinger, United States Magistrate Judge, issued a Report and Recommendation in the above-captioned matter recommending that defendants' motion to dismiss be granted in part and denied in part. See 06/02/11 Report & Recommendation at 33-35. Objections to the Report & Recommendation, if any, were due on June 20, 2011.

In early July the Court received a voluminous submission from the plaintiff. This submission appears to be addressed to each one of the three separate actions plaintiff has filed in this Court. See docket numbers 10 civ. 3102, 10 civ. 1782, and 10 civ. 3102. Notwithstanding the fact that plaintiff's submission was technically untimely and confusingly addressed to various issues in three different actions, the Court has construed plaintiff's submission as a written

objection to the June 2, 2011 Report and Recommendation and has reviewed both the objections and the underlying record de novo.

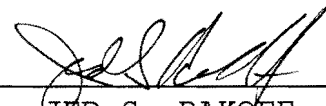
Having done so, the Court finds itself in agreement with Magistrate Judge Dolinger's Report and Recommendation and hereby adopts its reasoning by reference. Accordingly, the Court hereby: (1) dismisses with prejudice plaintiff's request for injunctive relief and plaintiff's Fourteenth Amendment claim for verbal assault; (2) dismisses without prejudice plaintiff's Fourteenth Amendment claim for racial discrimination and plaintiff's claims against the City of New York; and (3) denies defendants' motion to dismiss plaintiff's Fourteenth Amendment claim with respect to the toilet and sewage issues.

The Court notes, however, that while the June 2, 2011 Report & Recommendation recommends that the Court dismiss plaintiff's Fourteenth Amendment claim for overcrowding, see 06/02/11 Report & Recommendation at 17-20, it does not appear to unambiguously state whether the dismissal should be with or without prejudice. Accordingly, the Court hereby clarifies this ambiguity and orders that this claim be dismissed without prejudice.

In accordance with the conclusions of the 06/02/11 Report & Recommendation, plaintiff is hereby given leave to file a second amended complaint, which must be filed by no later than October 1, 2011. The plaintiff is advised, however, that this will be his last

opportunity to adequately plead the asserted violations, and that further leave to amend will not be granted.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'JED S. RAKOFF', is written over a horizontal line.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
August 16, 2011